United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-2153

To be argued by:
Ralph McMurry

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

KHALIEB McKINNON, et al,

Plaintiffs-Appellees,

-against-

J.W. PATTERSON, et al,

Defendants-Appellants.

----------X

B
P/S

BRIEF FOR DEFENDANTS-APPELLANTS

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-Appellants
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-4178

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

RALPH McMURRY
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

KHALIEB McKINNON, et al, :

Plaintiffs-Appellees, :

-against- : 76-2153

J.W. PATTERSON, et al, :

Defendants-Appellants. :

----------X

BRIEF FOR DEFENDANTS-APPELLANTS

Preliminary Statement

This is an appeal from a judgment of the United States District Court of the Southern District of New York, Stewart, J., dated October 12, 1976, insofar as the judgment ordered that inmates be afforded written notice of charges twenty-four hours in advance of adjustment committee proceedings in all cases involving keeplock.*

* The adjustment committee is the prison panel which hears less serious disciplinary cases. It can impose only minor penalties, including loss of privileges and keeplock, which is confinement in one's own cell for a limited period of time. The nature of keeplock is set forth at p. 12, infra. See 7 N.Y.C.R.R. 252.5.

Question Presented

Whether the Due Process Clause of the United States Constitution requires that inmates be given twenty-four hour advance written notice of charges in all cases involving keeplock?

Facts

On June 5, 1973, a "sit-in" or work stoppage was staged by several dozen inmates at the prison laundry at Eastern New York Correctional Facility, Napanoch, New York. According to the unanimous view of prison officials, the inmates in the laundry wanted to do "contract" laundry, or laundry for other inmates for a price and profit. This was against prison rules.

When the inmates refused instructions to return to work, they were keeplocked after the lunch break. Adjustment committee hearings were held on June 7, 1973. Plaintiffs were informed of the charges and given an opportunity to respond. Plaintiffs were given seven days keeplock with review, a review which apparently they did not receive.* Approximately two

* "Review" consists of a reexamination of the case by the Adjustment Committee to see if the restrictions should continue. The inmate's attitude is the focus here. 7 N.Y.C.R.R. 252.5(f).

weeks after the laundry incident, plaintiffs and other inmates involved in the disruption were transferred to other institutions.

A full statement of the laundry incident, the Adjustment Committee proceedings, and the nature of keeplock, as adduced by evidence at trial, is contained in an account of the trial, p. 3, infra.

Procedural History

Plaintiffs filed a pro se complaint in June, 1973, alleging various constitutional infirmities in their punishment by the Adjustment Committee and subsequent transfer to other institutions. Defendants' motion to dismiss was denied in part and granted in part in January, 1975. At this point counsel were appointed, and upon their motion for reconsideration the defendants' motion to dismiss was denied in its entirety. Amended complaints prepared by counsel were filed and answered by defendants.

Trial

The case came for trial on May 24, 25, and 26, 1976. The pertinent part of the evidence regarding the laundry incident, the Adjustment Committee proceed-

ings and the nature of keeplock, is as follows.

A. Laundry Incident

On June 5, 1973, an incident occurred in the laundry room at Eastern New York Correctional Facility, Napanoch, New York.

This "incident" was in fact a work stoppage by the inmates assigned to work in the laundry. Barthel, 163;* Blades, 308; Brock, 354, 355; Jones, 375.

The credible evidence is that some forty inmates in the laundry sought "contract" privileges. This consisted of doing personal laundry for other inmates for pay, such as commissary privileges or cigarettes. (Perrin, 246-249; Patterson, 315; Barthel, 165; Blades, 308; Brock, 354; Hartley, 362; Haseltine, 370.) The inmates in the laundry were given an opportunity to air their views. (Brock, 354; Blades, 308, 309.)

"Contract laundry" was against prison rules and policy. State's exhibits G, H, Rule 18. An inmate rulebook in existence at the time, and circulated in the

* Single numbers refer to pages at trial transcript.

ordinary course of business to all inmates, contained a prohibition against "contract" laundering. (State's exhibit H, Rule 18; Barthel, 165; Blades, 309; State's exhibit G; Brock, 354.)

The inmates were told by correction officials on June 5, 1973, that contract laundry was against prison rules. (Blades, 309; Hartley, 362; Haseltine, 370.)

The inmates were ordered to return to work, and they refused to do so. There was a rule in the prison requiring orders to be obeyed and complaints, if any, to be made afterwards. (Perrin, 249; State's exhibit H, Rule 4; Hartley, 362; Haseltine, 369, 370; Blades, 309.)

The inmates were told that the matter would be taken up with higher authority if they returned to work. They refused to return to work. (Barthel, 164 (twice); State's exhibit E; Blades, 309.)

Following the refusal of the inmates in the laundry to return to work, the plaintiffs were ordered keeplocked. (Blades, 310.) However, the keeplock was postponed until after the lunch period to avoid the possibilities of a disturbance at the laundry room.

(Blades, 310.)

There had been a history of problems in the laundry concerning contract work. (Barthel, 166.) The inmates had been told many times that contract work was against the rules. (Barthel, 166.)

Three reports in evidence on the laundry incident prepared at the time give accurate accounts of what transpired there. (State's exhibits C, E, F; Perrin, 244; Blades, 309, 311; Brock, 355; Hartley, 363; Haseltine, 371.)

The overwhelming weight of evidence, testimonial and documentary, supports defendants' version of the laundry incident. Plaintiffs' version of events is not credible. Plaintiff McKinnon testified that he heard no discussion by inmates on the morning of June 5, 1973, about "contract" work (101). The only mention of "contract" work was made by a corrections sergeant (101). In McKinnon's opinion, the dispute was allegedly only whether the prisoners in the laundry could do "personal" clothing for themselves or other persons (102). McKinnon claimed he "wouldn't know" whether there was to be a consideration involved for such "personal"

laundry (102). Plaintiff admits he did no work that morning (103). Plaintiff denies ever hearing an order to return to work or an offer by officials to take the matter up with higher authority if the inmates would return to work (103).

Plaintiff Maljih Allah, also known as David Wheeler, was also in the laundry on June 5, 1973. Plaintiff Wheeler said the dispute was about the privilege of inmates assigned to the laundry to do "personal" laundry, by which Wheeler meant only the personal laundry of the inmate assigned to the laundry* (140). Wheeler claims that the only mention of "contract" work was made by a corrections employee (140). Wheeler admits he never did any work in the laundry on June 5, 1973 (138, 139). Wheeler denies ever hearing an order to return to work or hearing any offer by a prison employee to take the matter up with higher authority if the inmates returned to work (139).

Plaintiff Karim Abdul Azim, also known as Lawrence Mincy, testified that he worked in the laundry

* McKinnon, on the other hand, said personal laundry also meant laundry for other inmates (102).

at Eastern, and had the privilege of doing Suni Muslim clothes (9). He described "contract" work as doing laundry for other inmates for commissary or cigarettes (9).

Mincy described the situation in the laundry as one of "confusion," "shouting," and "chaos" (20). He described the demand of the inmates as a simple desire to have a day to wash their own personal clothes (20). Mincy claims Lt. Blades misinterpreted this as a demand for contract laundering (21). Mincy allegedly said to Lt. Blades that it wasn't "contracting per se in the form of money" (21).

On cross-examination, Mincy changed his story. He said he couldn't recall if contract work was ever discussed by anyone on the morning of June 5, 1973 (52).

Mincy claims he never heard an order to return to work (21, 51). Mincy denies ever hearing an offer from a corrections official to take the matter up with higher authority if the inmates returned to work (51).

B. Adjustment Committee Hearings

All three plaintiffs appeared before the Adjustment Committee on June 7, 1973, two days after

the sit-in. (McKinnon, 72; Mincy, 25.)

Each plaintiff claims he had no prior notice that he would appear before the adjustment committee. McKinnon, 72; Allah a/k/a Wheeler, 129; Azim a/k/a Mincy, 25.

Mincy described the Adjustment Committee as a "kangaroo court" (26). He said he wasn't given a written copy of the charges against him (26). However, Mincy admits that he was notified of the charge against him and was asked if he had anything to say (26, 27). Mincy says he told the Committee that he had nothing to say and that the charges that he was in a sit-down strike were true (27). The hearing lasted one to one and one-half minutes (28). The Committee "huddled up" and then came out to announce a decision of seven days keeplock with review plus recommendation for job change (28).

According to McKinnon, he was shown a copy of the charges against him, the same copy a lieutenant read out loud (75). He admits being asked by the Committee if he had anything to say, and responding that it was a "personal thing between officers in there" (75). The

Committee went into a "huddle" and came back with a decision of seven days keeplock with review and a change in job assignment (76).

Wheeler admits that at his adjustment committee hearing he was told what he was accused of. He admits that he was asked if it was true that he was involved in a sit-down strike. He admits that he responded in the affirmative (130). He claims he had no prior notice that such a hearing would take place (131). He claims he was never asked if he wanted to call any witnesses, but admitted that he himself never asked for the opportunity to do so (131, 140).

Each plaintiff says he was never told he had a right to Superintendent's Review. Mincy, 28; McKinnon, 76-77; Wheeler, 131. All three plaintiffs claim they never had their seven day review (McKinnon, 88; Mincy, 29; Wheeler, 130).

Each plaintiff claims he was never told why he was being keeplocked until June 7, 1973. McKinnon, 72; Mincy, 23; Wheeler, 129. However, Lt. Blades testified that he told the inmates in the laundry incident on June 5, 1973, that they would be locked in if they did not return to work (309).

Defendant Perrin, Deputy Superintendent at Eastern, described the Adjustment Committee as made up of three persons: a lieutenant, a civilian, and a corrections officer. Their duty was to go over the facts of a misbehavior report, assess its validity, if any, and impose any necessary sanctions (190). The inmate has a right to remain silent and a right to be told at the hearing what the charges are against him (193, 194), but no right to call witnesses in his behalf (264). The inmate is asked for his side of the story (193).

There was some evidence that some inmates but not others in the laundry who had been keeplocked but not others were released after interviews (155-159, 174), apparently without seeing the Adjustment Committee. Perrin suggested that some of the inmates may have been selected for such interviews on the possibility that they may have participated in the sit-down as a result of peer pressure, although he did not know for certain (267-268).

C. Keeplock

The disposition as to each plaintiff by the Adjustment Committee was "keeplock" with review after seven days. (Plaintiffs' exhibits 28, 30, 35.) No "recommendation" for transfer or program change appeared in the disposition of any plaintiff.

"Keeplock" means that an inmate is confined in his own cell with his own personal belongings, books, earphones, showers, recreation after five days, regular diet, and generally attendance at religious services. (Perrin, 252.)

McKinnon testified that he was in keeplock for fifteen days. During this time he showered "about twice" and had recreation of periods of approximately one hour on three or four separate occasions (97). McKinnon had his own personal belongings and reading matter in the cell (98). His earphones were broken (97). McKinnon had running water (97-98).

Mincy claimed he was in keeplock for 15 days (33). He was permitted a shower once a week and had three or four sessions of recreation (53). He had his

personal belongings in his cell and had running water, but no radio (52). He was twice allowed to leave his cell to attend to his responsibilities on the inmate liaison committee (53, 54). Mincy also said that inmates were allowed out of their cells to sign the complaint (59).

Wheeler claims that while in keeplock for fifteen days he had his personal belongings, clothes, radio, and reading material in his cell. He was allowed to exercise three times, and had one opportunity for a shower (129, 137, 138). He claims he had no access to the law library and could receive books but not packages (131, 132).

Opinion Below

The District Court denied most of plaintiffs' claims for relief. However, the District Court did rule that 14 days keeplock was a "substantial deprivation" and that plaintiff's adjustment committee interviews were unconstitutional under Sostre. The Court ordered that in all future cases involving keeplock inmates must be given written notice of charges 24 hours in advance of the Adjustment Committee hearing. The District Court also ruled that no corrections official with personal

involvement in an incident could sit on any Adjustment Committee hearing charges relating to that incident.

Defendants appeal only from that portion of the judgment requiring twenty-four hour advance written notice of charges in Adjustment Committee cases involving keep-lock.*

ARGUMENT

DUE PROCESS DOES NOT REQUIRE TWENTY-FOUR HOUR ADVANCE WRITTEN NOTICE OF CHARGES IN ALL ADJUSTMENT COMMITTEE PROCEEDINGS INVOLVING KEEPLOCK.

In ruling that Due Process requires inmates to be given twenty-four hour advance written notice of charges against them in adjustment committee proceedings involving keeplock, the District Court committed clear

* This does not mean however that defendants concede the District Court was correct in awarding other relief. In particular, the factual basis for concluding that plaintiffs had adjustment committee interviews in which they were judged by a person with prior involvement with the event is at best weak; namely, that Lt. Demskie, who sat on the committee was "present outside the laundry room on June 5" (Opinion 21, fn. 15). Only direct involvement, not indirect, is sufficient to disqualify an individual from sitting on the committee. See Meyers v. Alldredge, 412 F. 2d 296, 306 (3rd Cir., 1974).

error. The error was five-fold. First, 14 days keeplock is not a "substantial" deprivation as the District Court found. Second, assuming arguendo keeplock is a substantial deprivation, plaintiffs were nonetheless afforded due process. Third, the District Court, while purporting to apply Sostre v. McGinnis, 442 F. 2d 178 (2d Cir., 1971), cert. den. 404 U.S. 1049, 405 U.S. 978 (1972) in fact applied retroactively a rule first set forth in Wolff v. McDonnell, 418 U.S. 539 (1974), contrary to the Supreme Court's specific edict in that case that the rule was not to be applied retroactively. Wolff, supra, at 573-574. Fourth, the District Court's opinion constitutes a formalization of the Adjustment Committee procedure which was totally unwarranted and unjustified by the facts of this case. Fifth, the District Court exceeded its authority and power in attempting to extend its order to the benefit of non-plaintiff inmates.

A. Limited Keeplock Is Not a "Substantial Deprivation"

Keeplock is not a "substantial" deprivation within the meaning of the Due Process Clause. As shown at trial, plaintiff-inmates in keeplock were permitted

showers, recreation, and a regular diet. Plaintiffs retained their personal belongings, reading matter, and radio. At least one plaintiff was even allowed outside his cell to attend meetings of the inmate liaison committee and inmates here were even allowed outside their cells to sign the complaint. Inmates in keeplock are generally permitted to attend religious services. No loss of good time in this case was ever proved.

Clearly the keeplock in this case pales in comparison to the deprivation found to be "substantial" in Sostre, supra (plaintiff in punitive segregation consisting of bare cell for more than year). Other courts have consistently found keeplock not to be a deprivation of substantial proportions. See Schumate v. People of the State of New York, 373 F. Supp. 1166 (S.D.N.Y., 1974) (vague complaint alleging segregation or keeplock of one week not necessarily deprivation of constitutional rights); Milburn v. Fogg, 393 F. Supp. 1164 (S.D.N.Y., 1973) (keeplock of five days plus loss of various privileges for unspecified time does not call into play full panoply of due process safeguards); Sczerbaty v. Oswald, 341 F. Supp. 571 (S.D.N.Y., 1972) (punishment for less than 15 days keeplock does not

warrant interference of federal court); Robinson v. Barola, 73 Civ. 787 (S.D.N.Y.) (72 hours keeplock and loss of institutional library job not a "substantial" deprivation); Landman v. Royster, 333 F. Supp. 621 (E.D. Va., 1971) (minor fines, loss of commissary and recreational privileges, and padlocking for less than ten days are not "substantial" deprivations); see also Esser v. Jeffes, 416 F. Supp. 719 (M.D. Pa., 1975) (written notice not required in hearings that, inter alia, do not result in major changes in conditions of confinement such as solitary and loss of good time).

In 1974 the Supreme Court in Wolff ruled that its decision should apply to situations involving loss of good time or solitary confinement, which were punishments authorized for serious misconduct under Nebraska law. The Supreme Court in Wolff took pains, however, to indicate that it was not suggesting that the procedures mandated there should apply where "lesser penalties" were involved. The Court did not define definitively the nature of "lesser penalties,"* but did suggest that they might encompass loss of privileges

* Nor did the record in Wolff indicate what was meant by "deprivation of privileges" under Nebraska law. Wolff, supra, n. 7.

and non-major changes in conditions of confinement. Wolff, supra, at 571, n. 19. The Supreme Court failed to reach this issue later in Baxter v. Palmigiano, 425 U.S. 308, 323 (1976) and thus the precise contours of "lesser penalties" remain to be delineated.

The issue in this case has not hitherto been squarely before this Court in a posture for decision, as this Court noted in Cunningham v. Ward, Slip Op. 731, ____ 2d Cir. ____ (12/1/76). Nonetheless the District Court found authority in two decisions of this Court for the proposition that "keeplock" is a "substantial" deprivation. Neither decision is persuasive.

In United States ex rel. Walker v. Mancusi, 467 F. 2d 51 (2d Cir., 1972), the Court did not hold that keeplock was a substantial deprivation. On the contrary, the Court held that keeplock in a separate facility or housing unit with conditions similar to those here was not a violation of the Eight Amendment and held further that a Superintendent's procedure in which each inmate was informed of the charges against him and given an opportunity to respond satisfied the rudiments of due process. A similar procedure and keeplock existed here; if anything the

Walker decision supports defendants' position at bar.

Similarly, United States ex rel. Larkins v. Oswald, 510 F. 2d 583 (2d Cir., 1975) is unpersuasive. There an inmate was confined in "isolation" or "segregation" for allegedly possessing "inflammatory" papers by the Adjustment Committee; in addition he was inexplicably held five days beyond that of his sentence. The Court held that the plaintiff was punished for impermissible reasons, and did not reach the issue of whether due process required a written statement of the charges. Clearly this case is not authority for the proposition that "keeplock" requires a twenty-four hour advance written notice rule.

Plainly a limited keeplock, while obviously a deprivation, is not so substantial as to call into play the formal due process requirement of advance twenty-four hour written notice of the charges. The Supreme Court only recently in Moody v. Daggett, ___ U.S. ___, 44 U.S.L.W. 4017 (11/15/76) emphasized that the Court has "rejected the notion that every state action carrying adverse consequences for prison inmates automatically activates a due process right." Moody, supra, at 4020, fn. 9. This conclusion is

buttressed by an examination of the facts in this case, which demonstrate beyond peradventure that such a rule is totally unwarranted and unnecessary to achieve simple justice in situations involving the limited keeplock which an Adjustment Committee can impose. See part "D," infra.

B. Assuming arguendo Fourteen Days Keeplock Was a Substantial Deprivation, Plaintiffs were afforded Due Process Law

Assuming arguendo fourteen days keeplock was a substantial deprivation, plaintiffs were afforded due process of law. Under applicable law, Sostre, supra, as well as departmental regulations, 7 N.Y.C.R.R. 252, et seq., plaintiffs were entitled to a notice of the charges and an opportunity to respond.* This is exactly what plaintiffs got according to the testimony of the plaintiffs themselves.

All plaintiffs admitted being informed of the charges against them. No plaintiff claimed he did not understand them. All plaintiffs admitted being given an

* Wolff is not retroactive and Sostre did not require 24 hours advance written notice.

opportunity to respond. No evidence was ever presented that the cases were not decided on the merits. Clearly, even assuming that keeplock was a "substantial" deprivation, this is all Sostre required in 1973.

Plainly the adjustment committee interviews accorded with existing law. Plaintiffs got exactly what they were entitled to under the law. Even the District Court admitted that the interviews followed procedures in effect at the time (Opinion at 21).

The District Court did conclude "that New York State did not give plaintiffs the opportunity to be informed of the charges against them in advance of the hearing." Opinion at 21. That conclusion is correct as far as it goes, but the District Court was wrong in asserting that Sostre requires advance notice of the charges. (Opinion at 21.) Sostre imposes no such requirement. If this is what the District Court had in mind when it ruled that the interviews were constitutionally deficient, the District Court was in clear error.

The District Court also faulted the State for reinterviewing some inmates and not others, and for

selecting some inmates for private interviews and not others. However the propriety of these interviews has no bearing on the constitutional necessity of a twenty-four hour rule or the integrity of the initial adjustment committee interviews claimed to be constitutionally deficient. Nor does the alleged participation on the committee of Lt. Demskie, supposedly involved in the laundry room incident although he was not in the laundry room, bear on the efficacy or legal necessity of a twenty-four hour rule.

In sum, plaintiffs received exactly what they were entitled to under the applicable law even on the assumption that their keeplock was a "substantial" deprivation. This was proved from plaintiffs' own testimony at trial. The issuance of a judgment against the defendants when their actions accorded with legal mandate is a violation of their own right to due process.

C. The District Court's Decision Improperly Applies a Wolff v. McDonnell Rule Retroactively

In holding on the facts of this case that twenty-four hour advance written notice of charges in adjustment committee proceedings involving keeplock is required, the District Court in effect was applying

retroactively a rule first enunciated in Wolff, supra. The Supreme Court has specifically declared that these rules must not be applied retroactively. Wolff, supra, at 573-574. See Cox v. Cook, 95 S. Ct. 1237 (1975). The District Court's retroactive application of a Wolff rule while purporting to follow Sostre is obvious and patently indefensible.

Moreover, the District Court had no power or jurisdiction to require a 24 hour rule in future cases since the named plaintiffs presented a case or controversy only as to procedures taking place in 1973. Assuming arguendo that the District Court could impose such a rule as to future cases involving keeplock on a possible theory that standards have changed since 1973, the District Court had no power to award relief to anyone other than the two named plaintiffs in custody. See Point E, infra.

D. The Formalization of the Adjustment Committee Proceeding is Totally Unwarranted by the Facts of this Case

The District Court's opinion imposes on the State's prison system a formalization of the Adjustment Committee procedure totally unwarranted and unjustified by the facts of this case.

The charges against plaintiffs were simple to understand. Plaintiffs were told what the charges were and no plaintiff claimed he could not understand them. On the contrary, it is plain that plaintiffs did understand them. Moreover, plaintiffs had an opportunity to respond. There was no evidence that the cases were not decided on the merits. Under the circumstances, it is difficult to perceive what salutary purpose is served by the District Court's twenty-four hour advance written notice rule. This is especially so since the inmate before an Adjustment Committee has no rights to counsel or confrontation and other formal procedural rights which could give the twenty-four hour rule some real utility.

The District Court apparently felt the twenty-four hour rule was appropriate because it did not see what the burden would be on correction officials to follow such a rule. (Tr. 408-9). Assuming this to be true,* it certainly does not follow that such a rule is required by the Constitution.

* Defendants deny this is true. Compliance with this rule in prisons in the Southern District has necessitated creation of a cumbersome dual interview system. Since obviously the Committee cannot tell in advance that a given case will "involve" keeplock, a preliminary interview is required. If it appears at the preliminary interview that keeplock may be appropriate, the inmate is handed a written notice of the charge and returns for the full interview the next day.

The formalization of the Adjustment Committee procedure here is unfortunate because it goes a substantial distance in obliterating the difference between the Superintendent's Proceeding and the Adjustment Committee Proceeding, and sets the stage for the completion of the obliteration process in future cases involving mere "privileges." In New York's prison system these two procedures are different. The Superintendent's proceeding is reserved for more serious offenses and penalties and the accused inmate is entitled to a panoply of formal due process safeguards. The Adjustment Committee proceeding on the other hand is reserved for less serious offenses and penalties and the procedure is more flexible, consisting essentially of notice of the charges and a chance to be heard. Remedial and guidance purposes are as much a part of the Adjustment Committee system as "discipline." See 7 N.Y.C.R.R. 252, et seq., especially 250.2(a); 251.5(a); 252.2(d); 252.4(c) and 252.5(a)(b). Such a two-tiered disciplinary system imports flexibility into a prison atmosphere where flexibility is required.

In imposing a twenty-four hour written notice rule on the Adjustment Committee in keeplock cases, the District Court sacrificed this flexibility without any

factual showing that its rule will achieve any compensating salutary purpose of any kind. The practical impact of the rule - to write down a simple charge on paper and then delay an equally simple hearing for twenty-four hours - is of doubtful significance to anyone. Certainly on the flimsy facts of this case it cannot be said plaintiffs suffered any damage whatever because of the absence of such a rule.

This Court warned in the landmark Sostre case against fashioning "a constitutional harness of nothing more than our guesses." Sostre, supra, at 197. The District Court clearly ignored this warning. The twenty-four hour rule imposed here is a classic case of a harness based on guesses and unrelated to any facts in the case in which the District Court chose to impose such a rule. As the Sostre Court said (at 197):

> "It would be mere speculation for us to decree that the effect of equipping prisoners with more elaborate constitutional weapons against the administration of discipline by prison authorities would be more soothing to the prison atmosphere and rehabilitative of the prisoner, or, on the other hand, more disquieting and destructive of remedial

> ends. This is a judgment entrusted to state officials, not federal judges."

Assuming arguendo the twenty-four hour rule has any vitality at all in the Adjustment Committee keeplock situation, it is respectfully submitted that such a rule should be required only where the keeplock imposed is more than seven days. It cannot be said as a matter of constitutional law that all keeplock or all extra confinement is a "substantial" deprivation. Indeed, the District Court only ruled that fourteen days keeplock was a substantial deprivation, although its order imposing a twenty-four hour rule applies to all keeplock. A seven day rule would represent a fair compromise between the interests of both sides, giving added due process protections to inmates whose keeplock extends beyond one week and affording the Adjustment Committee flexibility by giving it limited authority to impose a limited degree of extended cell confinement.

As the Supreme Court has said, "there must be mutual accommodation between institutional needs and objectives and the provision of the Constitution that are of general application." Wolff v. McDonnell, supra, at 556. The Adjustment Committee and keeplock is just

such an accommodation. At the very least this Court must not permit this accommodation to be upset on the very flimsy evidence adduced at the trial below.

E. The District Court Lacked Jurisdiction to Confer the Benefits of its Order to Any Inmates Save Plaintiffs

No class action was ever sought or certified in this case. Nonetheless, the District Court ordered defendants to implement this new rule in all future cases involving keeplock. That the District Court contemplated that this order would extend to inmates other than plaintiffs is plain from the court's opinion and judgment. It is also abundantly clear from a reading of the District Court's short memorandum order denying defendants' motion for a stay pending appeal. The District Court gave as a reason for denying a stay that a stay would harm "other interested" prison inmates (quotations in original). Obviously there are no "other interested" inmates in this lawsuit.

Clearly the District Court was acting in excess of its power in extending its order to inmates other than plaintiffs. The only plaintiffs in this case were the named plaintiffs. They are the only plaintiffs entitled to any relief, assuming relief is warranted.

CONCLUSION

THE JUDGMENT BELOW MUST BE REVERSED INSOFAR AS IT AWARDS RELIEF TO PLAINTIFFS. IN THE ALTERNATIVE, THE JUDGMENT SHOULD BE MODIFIED TO REQUIRE TWENTY-FOUR HOUR WRITTEN NOTICE IN ADJUSTMENT COMMITTEE HEARINGS ONLY IN CASES INVOLVING MORE THAN SEVEN DAYS KEEPLOCK.

Dated: New York, New York
January 12, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-
Appellants

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

RALPH McMURRY
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Ralph McMurry, being duly sworn, deposes and says that he is employed in the office of the Attorney General of the State of New York, attorney for defendants-appellants herein. On the 14th day of Jan, 1977, he served the annexed upon the following named persons:

Gage Andretta, Esq
Skadden, Arps, Slate, Meagher & Flom
919 3rd Avenue
NY NY 10022

Richard Fuchs, Esq
Koskoff, Koskoff, Kutkin & Bieder
1241 Main Street
Box 1698, Bridgeport, Connecticut

Attorney in the within entitled action by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by them for that purpose.

Ralph J. McMurry

Sworn to before me this
14th day of January, 1977

Assistant Attorney General
of the State of New York